Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Telecommunication Act of 1996	)	CC Docket No. 96-115
	)	
	)	
Telecommunications Carriers' Use Of Customer Proprietary Network Information and Other Customer Information	)	
	)	
	)	
Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, As Amended	)	CC Docket No. 96-149
	)	
	)	

REPLY COMMENTS OF SBC COMMUNICATIONS INC.

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SUMMARY

The record clearly demonstrates that a mandatory opt-in approval mechanism would not survive constitutional scrutiny. The Commission, therefore, should revise its rules to permit carriers the flexibility to use opt-in or opt-out approval methods.

The two commenters supporting retention of a mandatory opt-in approval method failed to demonstrate that opt-out is insufficient to inform consumers of their CPNI rights, that opt-out is burdensome to consumers, or that consumers would fail to comprehend opt-out notifications. Accordingly, the Commission should dismiss these commenters' claims.

The record does not support a re-examination of the interplay of sections 222 and 272. The record clearly establishes that an opt-out approach does not call into question the Commission's conclusions reached in these proceedings that the nondiscrimination obligations of section 272 are inapplicable to BOCs' sharing of CPNI with their section 272 affiliates. Further, the Commission has already considered and properly rejected all arguments raised in this proceeding advocating a re-examination of the Commission's section 272 findings.

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REPLY COMMENTS OF SBC COMMUNICATIONS INC TO SECOND FURTHER NOTICE OF PROPOSED RULEMAKING

SBC Communications Inc (SBC), on behalf of itself and subsidiaries, hereby files these reply comments in response to the comments received in the above-captioned docket. The industry overwhelmingly supports adoption of an opt-out approach to secure CPNI approval. Further, the record demonstrates that a mandatory opt-in approach would violate the First Amendment. The Commission, accordingly, should revise its rules to permit carriers the flexibility to use opt-in or opt-out. Further, the record does not warrant a re-examination of the interplay of sections 222 and 272. The Commission has considered and rejected the arguments raised in support of a re-examination and, therefore, should affirm its prior determination that section 272(c)(1) is inapplicable to BOCs' sharing of CPNI with their section 272 affiliates.

I. The Record Overwhelmingly Supports Use Of an Opt-out Approach.

The record overwhelmingly supports use of an opt-out approach.[1] Virtually every commenter agreed that an opt-out approach effectively balances the privacy interests embodied in section 222, with carriers' right to free speech. Further, nearly every commenter agreed that a mandatory opt-in approval mechanism is more restrictive than necessary to safeguard consumer privacy interests and excessively burdens free speech in contravention of carriers' First Amendment rights. The Commission, accordingly, should permit the use of opt-out as a CPNI approval mechanism.

The record, however, also demonstrates the efficacy of opt-in under certain circumstances.[2] Specifically, commenters recognize that opt-in approval may be more appropriate for certain types of customers.[3] SBC therefore urges the Commission to permit carriers the flexibility to use either opt-in or opt-out to secure CPNI approval.

Despite almost universal recognition of the constitutional problems posed by a mandatory opt-in requirement, two parties, EPIC and Mpower, argue that mandatory opt-in approval is the only mechanism capable of safeguarding consumer privacy interests.[4] EPIC argues that an opt-out approach is inadequate because it is will not reasonably inform consumers about their

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[1] AT&T Comments; AT&T Wireless Comments; ALLTel Comments; BellSouth Comments, CenturyTel Comments; Cingular Wireless Comments; Direct Marketing Association Comments; Nextel Comments; NTCA Comments; OPATCO Comments; Qwest Comments; SBC Communications Inc Comments; Sprint Comments; USTA Comments; VarTec Telecom, Inc Comments; Verizon Comments; Verizon Wireless Comments; and WorldCom Comments.

[2] ALLTel Comments; AT&T Comments; Cingular Wireless Comments; NTCA Comments; SBC Comments; and Sprint Comments.

[3] AT&T Comments at 3 n.1; Cingular Wireless Comments at 2-3, 4; SBC Comments at 15.

[4] EPIC Comments at 4-7; Mpower Comments at 8.

privacy options, and is burdensome for consumers because they have to act to restrict their information. In addition, EPIC argues that polling data and other studies show that opt-out notices are unintelligible, and that consumers believe an opt-in approach would more likely protect their privacy.[5] Mpower argues that consumer privacy interests trump any interest carriers have in commercial speech and that opt-in is necessary to protect customers' control over sensitive information.[6]

SBC urges the Commission to reject these unsubstantiated claims. First, EPIC has proffered no evidence showing that an opt-out approach is insufficient to inform consumers of their CPNI rights. Many carriers have used and continue to use opt-out notifications to inform consumers of their CPNI rights.[7] EPIC has not shown that any of these notifications were inadequate to provide consumers sufficient knowledge of their CPNI rights. Further, the minimum notification guidelines recommended by SBC in its comments would ensure that consumers are sufficiently informed of their CPNI rights. Moreover, because of the proliferation of opt-out notifications used by other industries, where much more sensitive information is at stake, consumers likely expect and look for information regarding their privacy rights in written notifications.

Second, EPIC did not offer any support or analysis for its claim that consumers believe an opt-out approach is burdensome, and it defies logic to assume that it is excessively burdensome. Signing and returning a form, or dialing a 800 number are simple procedures to restrict CPNI. Unsubstantiated speculation that these and other simple processes are burdensome

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[5] EPIC Comments at 5-6.

[6] Mpower Comments at 8.

[7] Sprint Comments at 5-6.

is not a sufficient basis for abridging First Amendment rights.[8] This claim therefore should be rejected outright.

Third, there is no basis for EPIC's claim that opt-out CPNI notifications would prove unintelligible to consumers. To support this claim, EPIC cites one article concluding that privacy notifications in the financial industry are couched in language above the reading level of most Americans. Whether true or not, this support is insufficient to justify a finding that CPNI opt-out notifications used in the telecommunications industry are or would be unintelligible. Again, EPIC has not produced a scintilla of evidence demonstrating that consumers have failed to, or would not, comprehend CPNI opt-out notifications. Several carriers have used opt-out notifications over the last two years and EPIC has not shown that any of these notices were confusing. EPIC's claim, therefore, amounts to empty rhetoric.

Fourth, EPIC's polling data does not establish that consumers believe that an opt-out approach is inadequate to protect their privacy. EPIC failed to provide any information regarding the methodology of its survey, including who was contacted and the questions asked.[9] For this reason alone, EPIC's survey is entitled to no weight. Further, survey data about consumer preferences provides no basis whatsoever for abridging constitutional rights.

Finally, Mpower erroneously discounts the significance of carriers' right to commercial speech. A carrier's right to commercial speech is protected under the First Amendment and the Commission can never abridge this right absent a satisfaction of the four-part test articulated by

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[8] *U.S. West v. FCC*, 182 F.3d 1224, 1239 (10th Cir. 1999), *cert. denied*, 120 S.Ct 2215 (June 5, 2000).

[9] For example, the survey data fails to show whether consumers were asked if opt-out notification is sufficient, or to consider the customer convenience an opt-out approach affords.

the Supreme Court in *Central Hudson*.[10] Accordingly, in fashioning an approval mechanism pursuant to section 222(c)(1), the Commission is obligated not only to consider privacy interests, but also the burden any approval method would have on carrier or consumer First Amendment rights. Mpower did not, and for that matter, could not demonstrate that opt-out fails adequately to balance these two interests or that mandatory opt-in approval is properly tailored to effectuate Congress' privacy goals. Without such a showing, the Commission simply cannot justify a mandatory opt-in approach.

II. The Record Does Not Justify a Re-examination of the Interplay of Sections 222 and 272.

The record does not support a re-examination of the interplay of sections 222 and 272. As SBC and other commenters demonstrated in their comments, an opt-out approach does not call into question the Commission's conclusions reached in the *CPNI Order* or *Reconsideration Order* that the nondiscrimination obligations of section 272(c)(1) are inapplicable to BOCs' sharing of CPNI with their section 272 affiliates.[11] The record firmly establishes that the Commission's analysis was not dependent on any approval mechanism, but rather congressional intent and public interest factors. Commenters advocating a re-examination of the Commission's section 272 findings have simply rehashed the same arguments previously considered and rejected by the Commission. As discussed below, the Commission should again reject these arguments and affirm its prior conclusion that section 272(c)(1) is inapplicable to CPNI.

AT&T, WorldCom and Ascent argue that the plain language of section 272(c)(1) compels the Commission to treat CPNI as a subset of "information," and thus apply the

[10] *Central Hudson Gas & Electric Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557 (1980).

[11] BellSouth Comments at 8-9; Qwest Comments at 24-26; SBC Comments at 18-22; Verizon Comments at 8-11.

nondiscrimination obligations of section 272(c)(1) to a BOC's sharing of CPNI with its section 272 affiliate.[12] They are wrong. As the Commission recognized in *the CPNI Order*, the courts have long held that a canon of statutory construction is that the specific governs the general.[13] Consistent with this principle, section 222, not section 272, governs CPNI. Indeed, the Commission already considered and rejected this argument, concluding that the most reasoned reconciliation of sections 222 and section 272(c)(1) is that section 272(c)(1) does not impose additional obligations when BOCs share CPNI with their section 272 affiliates.[14] AT&T, WorldCom and Ascent have proffered nothing to disturb this analysis. Thus, this claim should be rejected.

AT&T argues that the Commission's decision not to apply section 272(c)(1) was inextricably intertwined with the Commission's opt-in policy.[15] This simply is not true. As SBC demonstrated in its comments, the Commission concluded that section 272(c)(1) did not apply to a BOC's sharing of CPNI with its section 272 affiliate because it determined that (1) Congress did not intend to inject additional CPNI obligations in section 272; (2) application of section 272 would frustrate customer convenience and control goals; (3) section 222 is sufficient to address competitive concerns; and (4) non-application of section 272 to CPNI is consistent with the

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[12] AT&T Comments at 13-14; Ascent Comments at 4; WorldCom Comments at 11.

[13] Order and Further Notice of Proposed Rulemaking, In the Matter of Implementation of the Telecommunications Act of 1996, Telecommunications Carriers' Use of Customer Proprietary Network Information and Implementation of Non-Accounting Safeguards of Section 271 and 271 of the Communications Act of 1934, as Amended, CC Docket Nos. 96-115 and 96-149, 13 FCC Rcd 8061 (1998) (CPNI Order), ¶160; s*ee Dan Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384-85 (1992).

[14] *Id.*

[15] AT&T Comments at 12.

regulatory symmetry Congress required for carrier marketing activities.[16] None of these prior conclusions hinged on opt-in approval. AT&T's claim, thus, is meritless and should be rejected.

AT&T, WorldCom and Nextel argue that section 272 prohibits BOCs from sharing CPNI with their section 272 affiliates unless they obtain customer approval to share CPNI with unaffiliated entities, and obtain the customer approval in the same manner.[17] These parties have not only misinterpreted the nondiscrimination obligations of section 272, but have expanded section 272 to encompass customer approval mechanisms. CPNI approval mechanisms are governed exclusively by section 222. Solicitation of CPNI approval in no way amounts to the provision of CPNI and accordingly could never be subject to any nondiscrimination obligations under section 272. Further, as the Commission correctly determined in the *CPNI Order*, the nondiscrimination obligations of section 272 should not apply to the solicitation of customer approval because such an interpretation would require BOCs to solicit approval for all entities, which would not constitute effective customer notice or informed approval.[18]

Nextel and AT&T argue that application of section 272(c)(1) is necessary to eliminate competitive asymmetry.[19] These parties contend that BOCs would use their customer bases and store of CPNI to exclusively advantage their affiliates to the detriment of competition and consumers. It is ironic, to say the least, that AT&T would make this argument. AT&T has a substantial embedded customer base of present and former customers about which it has a

[16] SBC Comments at 18-22; *CPNI Order*, ¶¶160-168. Congress sought to ensure that BOCs would have an equal opportunity to compete with other large carriers, such as WorldCom and AT&T, in their provision of local and long distance service packages.

[17] AT&T Comments at 17; Nextel Comments at 12-13; WorldCom Comments at 11.

[18] *CPNI Order*, ¶163.

[19] AT&T Comments at 14, 16 n.11; Nextel Comments at 12.

considerable body of information. Indeed, it has more customers and more information about those customers' use of long distance services than any BOC, and it has admitted as much, boasting, "[w]e now have a database with information about nearly 75 million customers. We know their wants, needs, buying patterns, and preferences."[20] In any event, the Commission has considered and properly rejected the argument that the application of section 272 to CPNI is necessary to promote competitive parity. Specifically, the Commission concluded that sections 222(c)(1), (2) and (3) work together to address competitive concerns regarding a BOC's use or provision of CPNI, rendering the application of section 272(c)(1) inessential.[21] AT&T and Nextel have presented nothing to alter this conclusion. Indeed, neither carrier has demonstrated exactly what the competitive or consumer harm is. The fact is BOCs cannot share CPNI with their affiliates, except as permitted under section 222(c)(1), without customer approval. In this respect, the BOCs are on exactly the same footing as AT&T and other competitors. What AT&T and Nextel seek is not parity, but an advantage.

AT&T, WorldCom and Ascent argue that BOCs could satisfy sections 222 and 272 without any burden simply by soliciting blanket CPNI approval covering third parties as well as section 272 affiliates.[22] Such approval, they argue, could be gained via a single opt-out notice.[23] Once again, the Commission has considered and rejected these arguments, finding that BOC

[20] "Keeping the Customer Satisfied," Remarks by Executive Vice President, AT&T Consumer and Small Business Division, AT&T, to Morgan Stanley Conference (February 13, 1996).

[21] *Id.* ¶¶164-164.

[22] AT&T Comments at 15; Ascent Comments at 5; WorldCom Comments at 11.

[23] *Id.*

solicitation of CPNI approval for other carriers would pose an insurmountable burden.[24] The reality is consumers are unlikely to consent to a BOC's sharing of their CPNI with unnamed and unknown third parties in order to hear about the BOC affiliate's products or services.[25] Common sense compels such a finding. The result would be an excessive burden on the BOCs' ability to engage in commercial speech,[26] and thus an infringement on the BOC's First Amendment rights. Such a solicitation requirement also would place BOCs at a competitive disadvantage because every other carrier would be permitted to share CPNI with their affiliates without having to solicit CPNI consent for third parties. The Commission must not be swayed by these commenters attempts to minimize the enormity of such a task. In addition, BOC customers would be placed in the position of having to agree to disclose their CPNI to everybody or no one. This would frustrate customer expectations that companies with whom they do business will provide targeted marketing to meet their needs. Further, and perhaps most importantly, such a result would usurp consumer control over their CPNI — the cornerstone of section 222 —

[24] Order on Reconsideration and Petitions for Forbearance, In the Matter of Implementation of the Telecommunications Act of 1996, Telecommunications Carriers' Use of Customer Proprietary Network Information and Implementation of Non-Accounting Safeguards of Section 271 and 271 of the Communications Act of 1934, as Amended, CC Docket Nos. 96-115 and 96-149, 14 FCC Rcd 14409 (1998) (*Reconsideration Order)*, ¶142 ("the burden imposed by the nondiscrimination requirements would, in this context, pose a potentially insurmountable burden because a BOC soliciting approval to share CPNI with its affiliate would have to solicit approval for countless other carriers as well, known or unknown.).

[25] This is particularly so in the case of opt-in where consumers have to make an immediate decision as to whether to grant CPNI consent. Consumers simply are unlikely to agree to their provider's disclosure of CPNI to third parties.

[26] How could BOCs adequately inform consumers of third party identities to ensure effective notice? Would BOCs have to keep track of all carriers entering or exiting the market? Would BOCs have to devise general third party categories and constantly monitor the industry to ensure that third parties are effectively captured by a particular category? Such tasks would prove burdensome and far outside the scope of section 272.

because BOC customers would be prohibited from exercising control over the disclosure of their CPNI. This clearly could not have been the intent of Congress.

In any event, AT&T and Nextel fail to recognize that Congress intended for BOCs and their section 272 affiliates to engage in joint marketing. In the *CPNI Order*, the Commission correctly concluded that Congress, via section 272(g)(2), contemplated that BOCs would sell and market the long distance services of their affiliates upon section 271 approval.[27] Recognizing that such activity would implicate the nondiscrimination obligations of section 272(c)(1), Congress, in section 272(g)(3), excepted such joint marketing activity from the nondiscrimination obligations of section 272(c). This can only mean that Congress expected BOCs to actively market on behalf of their section 272 affiliates and not engage in blind, non-specific, non-targeted marketing. Section 272(c)(1) does not create an impermeable wall between BOCs and their affiliates. To find otherwise would render section 272(g)(3) an empty vessel.

The bottom-line is the Commission has considered and rejected all of the arguments presented by AT&T, Nextel, WorldCom and Ascent. The Commission therefore should affirm its prior conclusion that the nondiscrimination obligations of section 272(c)(1) are inapplicable to BOCs sharing of CPNI with their section 272 affiliates.

[27] *CPNI Order*, ¶168 ("…the exception in section 272(g)(2) further contemplates that BOCs can maintain relationships with their long distance affiliates when they jointly market the services of these affiliates, that would not be subject to nondiscrimination principles.).

III. Conclusion

For the foregoing reasons, the Commission should permit carriers the flexibility to use opt-in or opt-out mechanisms to secure CPNI consent and affirm its prior finding that the nondiscrimination obligations of section 272(c)(1) are inapplicable to BOCs' sharing of CPNI with their section 272 affiliates.

Respectfully Submitted,

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November 16, 2001

CERTIFICATE OF SERVICE

I, Lacretia Hill, do hereby certify that on this 16th day of November a copy of the foregoing "Reply Comments " was served by U.S. first class mail, postage paid to the parties on the attached sheets.

/s/ Lacretia Hill
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